Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-1060

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD L. NELSON
Plaintiff-Respondent

vs.

THE GREAT WESTERN SUGAR CO.,
a
Delaware corporation,
Defendant-Petitioner.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals abuse its discretion herein by permitting the District Court's judgment to stand while simultaneously dismissing Petitioner's appeal as moot?

II. ARGUMENT

The material facts are adequately set forth in Part IV of the Petition for Writ of Certiorari.[1] The sole issue is whether the Court of Appeals abused its discretion when, in dismissing Petitioner's appeal, it refused to vacate the District Court's judgment and to remand the matter with instructions to dismiss the Complaint.

In his Suggestion of Mootness, the Respondent requested that the judgment of the District Court be vacated and that the within matter be remanded with instructions to dismiss. Such requested disposition was in accord with this Court's procedure in matters which have become moot during the appellate process. See, *e.g.*, *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 267 (1936); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Atkinson, Topeka & Santa Fe Railway Co. v. Dixie Carriers, Inc.*, 355 U.S. 179 (1957); *Parker v. Ellis*, 362 U.S. 574 (1960); *Preiser v. Newkirk*, 422 U.S. 395 (1975); see generally Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U.Chi.L.Rev. 77 (1955) [hereinafter, *Disposition of Moot Cases*]. The Respondent had obtained the sole object of his civil action, *i.e.*, arbitration of his discharge from the Petitioner's employment, and, therefore, the vacating of the District Court's judgment and dismissal of his Complaint were of no moment to him.[2]

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[1]Respondent would note that, while his discharge was sustained on the merits in arbitration, the arbitrator found his grievance to be procedurally arbitrable. Thus, the laches defense asserted by Petitioner before the District Court was effectively rejected.

[2]The District Court had ordered, in material part, only that the Petitioner "proceed forthwith to arbitration of [Respondent's] discharge in accordance with the provisions of the 1975 Collective Bargaining Agreement between [Petitioner] and Teamsters, Warehousemen and Sugar Workers Local Unions." Petition for Writ of Certiorari at A.4.

Nonetheless, the question becomes whether, under the facts herein, the Court of Appeal's disposition warrants the discretionary review of this Court. It must initially be noted that, despite its conclusory claims, the Petitioner has shown no prejudice that it has suffered, or will suffer, from such disposition. The proceeding before the District Court was limited in scope, and there exists no possibility of an adverse effect through res judicata or collateral estoppel. Vacating the District Court's judgment would, both practically and legally, have effected only a nullity. The force of the District Court's reasoning in its opinion – which is undoubtedly the sticking point for the Petitioner, will, of course, retain its vitality irrespective of the judgment's vacation. *Disposition of Moot Cases, supra* at 93. Consequently, the underlying purpose of the *Munsingwear* doctrine, to avoid subsequent attribution of any res judicata/collateral estoppel effect to an unreversed district court judgment, was inapplicable.[3] Under substantially similar circumstances to those presented herein, the Fifth Circuit Court of Appeals in *Armendariz v. Hershey*, 413 F.2d 1006, 1008 (1969), refused to exercise its discretion and vacate a district court's judgment when a matter became moot during the appeal process, because vacating the lower court's judgment would have served no purpose.

Respondent submits that, while it may have been technically appropriate for the Court of Appeals to have followed the *Munsingwear* procedure, its disposition did not prejudice the Petitioner and was not, therefore, inconsistent with the underlying purpose of that procedure. Finally, this matter does not warrant exercise of the Court's supervisory powers, nor does it raise an important question of federal law.

[3]In *Munsingwear* the appeal determined as moot involved only one of two counts which had been before the district court; the other count remained before the district court while the appeal was being processed. After the appeal had been dismissed as moot but the district court's judgment left unaffected, the second count was dismissed by the district court on the basis of res judicata. Thus, unlike this matter, the failure of the court of appeals in *Munsingwear* to vacate the district court's judgment had a prejudicial impact.

Sup.Ct.R. 19(b). Rather, the issue sought to be reviewed is, under the facts herein, insignificant and unnecessary of consideration.

III. CONCLUSION

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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Respectfully submitted,

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